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Supreme Court, U.S.
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NO. ~~A 313~~

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES DENNIS THOMPSON,
Petitioner
v.
UNITED STATES DEPARTMENT OF
JUSTICE, DEPARTMENT OF
NARCOTICS AND DANGEROUS DRUGS,
Respondent

PETITION OF CHARLES DENNIS THOMPSON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT, IN AFFIRMING THE DISCRICT COURT'S DENIAL OF PETITIONER"S MOTION FOR NEW TRIAL ON THE GROUNDS OF SURPRISE, MISCONDUCT OF COUNSEL, NEWLY DISCOVERED EVIDENCE AND IRREGULARITY OF PROCEEDINGS, DENIED PETITIONER A FAIR OPPORTUNITY TO SHOW THAT THE RESPONDENT"S STATED REASONS FOR TERMINATION OF PETITIONER'S EMPLOYMENT WERE IN FACT PRETEXT

PARTIES

CHARLES DENNIS THOMPSON

V

PETER B. BENSINGER, ADMINISTRATOR, UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, SUCCESSOR TO JOHN INGERSOLL, DIRECTOR, BUREAU OF NARCOTICS AND DANGEROUS DRUGS

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OPINION BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit is attached hereto as Appendix "A."

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 11, 1980. Petitioner's timely motion for rehearing was denied by the Court of Appeals for the Ninth Circuit on July 22, 1980 (See Order attached hereto as Appendix "B"). On October 14, 1980, this Court granted Petitioner an Order Extending Time To File Petition For Writ of Certiorari to and including October 30, 1980 (A copy of said Order is attached hereto as Appendix "C"). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES

The statute involved in this case is 42 U.S.C. §2000e-16:

Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 USCS § 102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS § 105] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual

review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) Consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity pro-

gram and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 USCS §§2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(c) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

STATEMENT OF THE CASE

A. Introduction and Proceedings Below

Petitioner Charles Dennis Thompson (hereinafter "Petitioner") is a Black citizen of the United States who, on June 21, 1971, was hired as a narcotics agent for the Bureau of Narcotics and Dangerous Drugs (hereinafter "BNDD"). Petitioner attended the BNDD training program at the National Training Institute in Washington, D.C., between June 28, 1971 and September 3, 1971. Petitioner was discharged from BNDD on April 7, 1972. The stated reason for Petitioner's termination was that he was unable to perform at an acceptable level as a criminal investigator.

Petitioner filed suit in the Federal District Court for the Northern District of

California on February 9, 1973 wherein it was alleged that his discharge from BNDD was the result of a "systematic and consistent course of harassment" because of his race or color, in violation of 42 U.S.C. § 2000e-16. Petitioner maintained jurisdiction in the Federal District Court pursuant to 28 U.S.C. § 1331(a) and Section 713.281 of the Federal Personnel System Manual Equal Opportunity Act of 1972.

On May 3, 1973, Respondent filed a motion for summary judgment which was denied on June 11, 1973.

Respondent filed a renewed motion for summary judgment on January 9, 1974 which was granted on March 4, 1974. On August 9, 1976, the Court of Appeals for the Ninth Circuit remanded this action for further proceedings consistent with Chandler v. Roudebush (1976) 425 U.S. 840.

The case was tried August 1, 2 and 4, 1977 before the Honorable Albert C. Wollenberg in the Federal District Court at San Francisco, California.

Judgment was entered against Petitioner on November 8, 1977. Petitioner's motion for a new trial on the grounds of surprise, misconduct of counsel, newly discovered evidence and irregularity of proceedings was denied on January 18, 1978.

Petitioner appealed the District Court judgment to the Court of Appeals for the Ninth Circuit asserting that the District Court erred in denying the motion for a new trial, that the findings of fact were unsupported by the evidence, and that given such unsupported findings the judgment could not stand.

On June 11, 1980, the Court of Appeals affirmed the judgment of the District Court. Petitioner subsequently filed a petition for rehearing which was denied on July 22, 1980.

B. Petitioner's Prima Facie Case of Discrimination

At trial Petitioner testified to the following incidents which occurred during the course of his training at N.T.I. in Washing-

ton, D.C.:

1. That he had been harassed by Mr. Kreppein, an official at the N.T.I., after having taken a weekend trip in July to San Francisco for which he had obtained permission (Reporter's Transcript [hereinafter "RT"] 8-11); and that other trainees had been permitted to leave Washington, D.C. without formal permission or reprimand;

2. That Petitioner on several occasions and in the presence of others had been called a "nigger" by William T. Franzly, an instructor at the institute (RT 12-14);

3. That Petitioner had been told by Mr. Bloomer, Personnel Director at the Institute, that "a guy with your middle class background should perhaps seek other employment" (RT 23);

4. That another official at Personnel, D.K. Baker, told him he was fired, allegedly because Petitioner had represented on his employment application that he was married when in fact he was not (RT 24-25); that when Petitioner told another superior, Mr. Rifkine,

that he had been fired without cause, since he was in fact married and could produce a marriage certificate to that effect, Mr. Rifkine conceded that Petitioner was married but added that Petitioner was a "militant" (RT 26-27);

5. That on one occasion, Bruce Zelinski, a fellow trainee and a group leader, authorized Petitioner and others to leave a machine gun training area; That Mr. J. Minor, an instructor, told Petitioner to return to the area and assigned him a cleaning detail as punishment for having left; That as he worked on the detail, Mr. Minor stood over him with a club in his hand and an automatic pistol visible in his back pocket; and that he was, to his knowledge, the only one so punished.

Petitioner further testified that shortly after being assigned to the San Francisco BNDD on or about September 5, 1972, Petitioner's supervisor, Peter Niblo, told him that people in Washington did not like him and that he was not "going to cut the mustard" (RT 39).

At that juncture in the proceedings, Petitioner's attorney read the following excerpt from a July 15, 1977 deposition of Peter B. Niblo (RT 40):

PLAINTIFF"S ATTORNEY: Page 5, line 17:

"MS. COOPER: Page 5, line 17:

"Q. When a recent graduate of training institute was assigned to your group, did you at that time receive information regarding that agent from the National Training Institute?

"A. No, ma'am.

"Q. You received no kind of information training reports, et cetera?

"A. No, Ma'am.

"Q. Okay. You're unaware, then, that the particular agent trainee received a training rating?

"A. I'm unaware of that.

"Q. All right. And would you be unaware of the particular rating that an agent would have received?

"A. That's correct.

"Q. Okay. In Mr. Thompson's case, were you aware of any unfavorable information regarding his performance at the National Training Institute?

"A. Yes, I was.

"Q. Did you ever advise Mr. Thompson of this unfavorable data?

"A. Well, let me answer it this way: Mr. Thompson, at the time I initially received what you termed unfavorable information, was at that time at the N.T.I."

In other words, Mr. Niblo essentially admitted that although he would generally be unaware of the particular rating an agent would receive at the training institute, he had been appraised of unfavorable information

concerning Petitioner before Petitioner even arrived for his assignment in San Francisco.

Other incidents of discrimination testified to by Petitioner which occurred after arriving in San Francisco are as follows:

1. That in the course of a case Petitioner was working on with the San Francisco Police Department his supervisor, Mr. Niblo, peremptorily pulled him out of the case and called him an "asshole" (RT67-69);

2. That while working on an assignment in Daly City, Sepcial Agent McCracken, who had driven Petitioner to Daly City, refused to drive him back to San Francisco (RT 76-77);

3. That Mr. Niblo refused to counsel petitioner about his performance beyond the general admonition to "work hard" (RT 74), except when pressured from a superior (RT 75);

Further testimony was taken from Mr. Vernon Bradley, the first attorney of record for Petitioner in this case. Mr. Bradley testified to a meeting, prior to filing suit in this action, between Petitioner, himself, and

Mr. Kenneth Cloud, equal opportunity officer at BNDD, in which Mr. Cloud stated, "You know there's really no point in this meeting -- you know the decision's already been made. You're really wasting your time and mine." (RT 49).

C. Respondent's Case

In attempting to establish that Petitioner was terminated for legitimate non-discriminatory reasons, Respondent elicited testimony from, inter alia, BNDD officer Dunagan and Agent Lionel Stewart. It is their testimony which formed the bulk of the Respondent's case and it is their testimony concerning four alleged incidents of misconduct on the part of Petitioner which is the subject of this petition.

Agent Lionel Stewart testified that Petitioner had told him that he, Petitioner, was going to flush some heroin, recently obtained in an arrest, down the toilet and that he had flushed contraband in a similar fashion when

working for the police department (RT 334-35).

Prior to the trial wherein the above testimony had been given, the court had issued, on June 17, 1977, a pretrial order, paragraph 5 of which reads as follows:

> "5. That on or about June 17, 1977, counsel for each of the parties furnish opposing counsel a brief resume of anticipated testimony of each potential witness (Record on Appeal, [hereinafter "RAP"] 132).

In response to this order Respondent sent opposing counsel a list of witnesses of which Item 6 reads as follows:

> "6. Lionel Stewart: This witness was a criminal investigator in Los Angeles during 1971 and subsequently transferred to San Francisco where he remains.
> "The witness has knowledge of Mr. Thompson's performance on the job" (RAP 190).

This resume of Mr. Stewart's testimony may be compared to that of Lowery K. Y. Leong, a relatively minor witness in Respondent's case:

> "5. Lowery K. Y. Leong: Mr. Leong has been a criminal investigator in the San Francisco office since before the arrival of Mr. Thompson. Mr. Leong is able to testify concerning an incident involving the completion of a written report during

which the plaintiff became enraged and refused to complete the report. The report was completed by Leong and another agent. This witness also has knowledge of the failure of Thompson to maintain a surveilliance on November 1, 1971 as ordered."

Towards the end of the trial on August 4, 1980, Petitioner's attorney requested the daily reports of Agent Stewart wherein reference to the statement Petitioner allegedly made about flushing heroin down a toilet would most likely be reported. Respondent's attorney reported that the "dailies" were routinely destroyed after two years (RT 406-7). Mr. Dunagan, however, admitted that subsequent to the commencement of Petitioner's suit, of which he had knowledge, Agent Stewart's dailies were still in existence.

Mr. Dunagan also testified to three alleged incidents of misconduct involving Petitioner:

1.) That Petitioner had told him that he, Petitioner, had obtained a "beer connection" (privilege of obtaining beer at a discount) for falsifying a police report (RT 273-74);

2.) That

> "On March 15, 1972, I [Dunagan] was contacted by Special agent Lionel Stewart who had been working undercover in a narcotics transaction in the Oasis Bar, a hotel restaurant here in San Francisco, a hotel restaurant here in San Francisco, just a few blocks away, and he was quite upset.
>
> And he asked me what--in essence, was Thompson doing at the bar shooting his mouth off that he was a federal agent, when there was a narcotics case being investigated with an undercover purchase of evidence upstairs in the motel?
>
> And I said--I asked if he thought he was correct, because Thompson had been on sick leave the previous day and that day.
>
> He said he was positive." (RT 270-271).

However, Stewart, who allegedly informed Dunagan of the alleged incident at the Oasis bar, testified under cross-examination conerning the incident as follows:

> "Q. Agent Thompson didn't identify himself as an agent in your presence, did he?
>
> A. No, I didn't hear him say that, no. As a matter of fact I didn't enter the bar." (RT 339)

3.) Dunagan further testified that Petitioner had misused a government vehicle and credit card, and specifically, that he, Dunagan, had interviewed Mr. Dan Tuttle, the manager of the service station in Ignacio, Cali-

fornia, where petitioner allegedly used a government credit card to purchase one dollar worth of gas for personal use. Dunagan testified that Tuttle had told him that Petitioner was wearing different clothes than he was wearing when he left work that day and that he was driving a different car than the government vehicle that he said he was driving (RT 266).

The text of Dunagan's testimony concerning the alleged interview with Dan Tuttle follows:

> "I then proceeded to a Chevron station in Ignacio and asked a man on duty, the night manager, if he remembered Mr. Thompson being there and buying one dollar's worth of gasoline. He said, yes, he had, that it was between 4:00 and 5:00 a.m. on the morning of the 8th of March and that Mr. Thompson was wearing a leather vest and driving a small automobile with a black vinyl top, dark in color.
>
> I said, 'Thank you.'
>
> The following morning, I came to the office--
>
> Q. Well, let me stop you at that point and just ask you a couple of questions about the information you got from the service station man.
>
> Now, first of all, when Mr. Thompson left work the prior evening, how was he dressed?
>
> A. In a business suit, I believe.

Q. All right. And how did the service station man describe his dress at the service station at 4:00 to 5:00 in the morning?

A. Casual clothing.

Q. Casual. All right.

And when he left work with the government car, what kind of car was it?

A. I believe it was a green Chevrolet.

Q. How did that compare with the description of the car given you by the service station attendant?

A. It didn't. It doesn't jive at all. They were two different cars.

Q. And it was also a discrepancy between the time that Mr. Thompson gave you and the time the service station man gave you?

A. That's correct.

In his motion for a new trial, Petitioner attached as Exhibit E (RAP 211) an affidavit of Dan Tuttle, the Ignacio service station manager, to the effect that Mr. Tuttle never spoke with Dunagan or anyone else concerning the alleged incident:

"I, DAN TUTTLE, declare:

1. On March 8, 1972, I was the night manager at the Standard Station at Ignacio, California.

2. I can identify my initial upon the attached copy of a service slip, which would indicate to me that I sold the $1.00 worth of gas on the slip.

3. No one identifying himself as a federal agent has ever talked with me concerning anyone coming into my station on or about March 8, 1972.

4. No one has ever talked to me, nor

have I made any statement to anyone concerning the person who purchased a dollar worth of gas at my station on March 8, 1972.

I declare under penalty of perjury that the foregoing is true and correct.

Executed as Sonoma, Cotati, California, on December 6, 1977.

/s/ DAN TUTTLE"

Finally, in connection with the "misuse of government vehicle" incident, Dunagan testified (RT 270) that Petitioner had admitted before him and Mr. Trainor, another BNDD agent, that Petitioner had sexual relations with the woman he drove home. However, the report filed by Mr. Trainor and attached as Exhibit D to Petitioner's motion for a new trial (RAP 210) contains no reference to the alleged sexual relations.

That the aforementioned testimony of Stewart and Dunagan concerning the four alleged incidents of misconduct was in fact material to the judgment in this case is reflected in the findings of fact and conclusions of law filed October 25, 1977 (RAP 139):

"2.d. While plaintiff was a member of Mr. Nibb's group he:...

(2) Suggested to another federal narco-

tic agent that heroin seized from a suspect be flushed down a toilet;...

2.f. While plaintiff was a member of Mr. Dunagan's group he:...

(2) Utilized a government vehicle and credit card without authorization and for personal reasons. When confronted with the matter, he lied to his superior officer concerning his activities on this occasion;...

(5) Reported to his superior officer that he was on sick leave when, in fact, he was drinking alcoholic beverages at a coctail lounge in San Francisco; and

(6) Admitted to his superior officers that while he had been a San Francisco police officer, he had falsified a burglary report for which he had received the privilege of purchasing beer at wholesale price."

REASONS FOR GRANTING THE WRIT

I. This Court Should Decide Whether the Court of Appeals For The Ninth Circuit, In Affirming The District Court's Denial Of Petitioner's Motion For New Trial On the Grounds Of Surprise, Misconduct Of Counsel, Newly Discovered Evidence and Irregularity Of Proceedings, Denied Petitioner A Fair Opportunity To Show That The Respondent's Stated Reasons For Termination Of Petitioner's Employment Were In Fact Pretext.

This Court articulated the standard for determining a claim of discrimination pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) in McDonnell

Douglas Corporation v Green (1973) 411 U.S. 792, and later reaffirmed the McDonnell decision in Furnco Construction Corp. v Waters (1978) 438 U.S. 567 and Board of Trustees v Sweeny (1978) 439 U.S. 24.

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." McDonnell, supra, at 802.
>
> "The burden must then shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell, supra, at 802.

Finally this Court, recognizing inter alia, "that Title VII tolerates no racial discrimination, subtle or otherwise" (McDonnell, supra, at 801, emphasis added), has consistently held that the plaintiff "must...be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." (Board of Trustees, supra, at 24, Furnco, supra, at 578, McDonnell, supra, at 804, emphasis added).

It is respectfully asserted that the decision of the court below is in conflict

with the rule so articulated by this Court in that Petitioner was not afforded a fair opportunity to show that Respondent's stated reason for Petitioner's termination was in fact pretext, and that said conflict is of such import in terms of the scope of Title VII protection as to warrant a grant of certiorari.

A. Petitioner Established a Prima Facie Case of Racial Discrimination by Respondent

> "A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination...Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in absence of any other explanation it is more likely than not that those actions were bottomed in impermissible considerations." (Furnco Construction Corp. v Waters (1978) 438 U.S. 567, 579-580).

The substance of Petitioner's testimony discussed, supra, in Part A of the Statement of the Case clearly establishes a prima facie case of discrimination.

Indeed, in light of Petitioner's testimony concerning his treatment at the Training Institute in Washington, with particular

reference to his testimony that instructor William T. Franzly on several occasions called Petitioner a "nigger" (supra, p. 8, RT 12-14) discriminatory animus need not be inferred; it is explicit.

Moreover, the record reveals that Petitioner's unfavorable evaluation which unarguably was affected by the discriminatory animus at the training institute was transmitted to the San Francisco BNDD at least to the person of Peter Niblo (supra, p 10, RT 40), Petitioner's supervisor upon Petitioner's commencement of employment with the San Francisco BNDD. Furthermore, the fact of transmittal of the unfavorable evaluation to Mr. Niblo was established by Mr. Niblo's own testimony (supra, p 10, RT 40). Mr. Niblo also admitted in his testimony that although he would generally be uninformed of the particular rating that an agent would receive at the training institute, he had been appraised of Petitioner's unfavorable rating before Petitioner even arrived for his assignment in San Francisco. This fact

alone, to wit, that Petitioner was singled out for transmittal of an unfavorable rating, while there was as a general rule no transmittal of unfavorable ratings of other trainees, establishes that Petitioner was the victim of an invidious pattern of discrimination which originated at N.T.I. in Washington and continued throughout Petitioner's employment with the BNDD in San Francisco.

Accordingly, it is respectfully asserted before this Court, as it was asserted to the Ninth Circuit on appeal, that the District Court's finding that "[t]he racial incidents referred to by plaintiff to have occurred at the training institute in Washington, D.C. during the summer of 1971 were in no way connected with anything that happened once plaintiff obtained employment in San Francisco upon completion of training" (Finding of Fact 2.b., RAP 139) is unsupported by the evidence and clearly erroneous.

B. The Court Of Appeals For The Ninth Circuit, In Affirming The Districts Courts' Denial of Petitioner's Motion For New Trial On The Grounds Of Surprise And Misconduct Of Counsel Relative To The Testimony Of Lionel Stewart, Denied Petitioner A Fair Opportunity To Show That The Respondent's Stated Reasons For Termination of Petitioner's Employment Were In Fact Pretext.

In attempting to establish that Petitioner was terminated for legitimate nondiscriminatory reasons, Respondent called as a witness Agent Lionel Stewart who testified that Petitioner had told him that he, Petitioner, was going to flush some heroin, recently obtained in an arrest, down the toilet and that he had flushed contraband in a similar fashion when working for the police department (supra, 12-13, RT 334-35).

As discussed supra, in Part C of the Statement Of The Case, the court had issued on June 17, 1977, a pretrial order, paragraph 5 of which provides as follows:

> "5. That on or about June 17, 1977, counsel for each of the parties furnish opposing counsel a brief resume of anticipated testimony of each potential

witness (RAP 132).

In response to this order Respondent sent opposing counsel a list of witnesses of which Item 6 reads as follows:

> "6. Lionel Stewart: This witness was a criminal investigator in Los Angeles during 1971 and subsequently transferred to San Francisco where he remains.
>
> "The witness has knowledge of Mr. Thompson's performance on the job" (RAP 190).

The extremely incriminating testimony of Agent Stewart concerning flushing of heroin, which testimony was accepted by the court at face value and incorporated into the findings of fact (supra, pp 18-19, RAP 139), was taken against Petitioner by surprise and as a result of the misconduct of Respondent's counsel in failing to alert Petitioner to the substance of Stewart's testimony pursuant to the court's pre-trial order of June 17, 1977.

The extent of misconduct on the part of Respondent's counsel, in contravention of the spirit of the Federal Rules of Civil Procedure that surprise should be eliminated as a trial

tactic, as well as the purpose and spirit of pretrial procedure (See Burton v Weyerhaeuser Timber Co., 1 F.R.D. 571 [District of Oregon, 1941]), is demonstrated by comparison of the resume of Agent Stewart's testimony with that provided for Mr. K. Y. Leong:

> "5. Lowery K. Y. Leong: Mr. Leong has been a criminal investigator in the San Francisco office since before the arrival of Mr. Thompson. Mr. Leong is able to testify concerning an incident involving the completion of a written report during which the plaintiff became enraged and refused to complete the report. The report was completed by Leong and another agent. This witness also has knowledge of the failure of Thompson to maintain a surveilliance on November 1, 1971 as ordered." (RAP 190)

While Respondent's counsel set forth in detail the anticipated testimony concerning such a relatively minor matter as Petitioner's alleged anger in preparing a report, the resume of Agent Stewart was extremely vague, and, therefore, misleading, given the importance of Mr. Stewart's "heroin flushing" testimony: "...the witness has knowledge of Mr. Thompson's performance on the job" (RAP 190).

The severe prejudice to Petitioner

resulting from Stewart's surprise testimony is amplified by the fact that when Petitioner's attorney requested the daily reports of Agent Stewart wherein reference to the statement Petitioner allegedly made would most likely be reported, Respondent's attorney reported that the "dailies" were routinely destroyed after two years (supra, p 14, RT 406-7), and therefore were not available.

The Respondent's destruction of the daily reports is, at best, a highly suspect act when viewed in light of Stewart's surprise testimony. If a statement concerning flushing of heroin had ever been made by Petitioner, it is virtually certain given the meticulous detail with which any minor infraction committed by Petitioner was recorded, that it would have been reflected in Agent Stewart's "dailies." And yet, despite Mr. Dunagan's admission that subsequent to the commencement of Petitioner's suit, of which he had knowledge, Agent Stewart's dailies were still in existence (supra, p 14, RT 406-7), the Respondent subsequently

destroyed the only documentary evidence available to either refute or corroborate the testimony of Agent Stewart.

As discussed in Petitioner's motion for new trial, and as urged on appeal, had Petitioner been properly forewarned of Stewart's testimony he would have been prepared to refute it with documentary and other evidence.

A similar case of surprise and misconduct of counsel arose in Seaboldt v Pennsylvania Railroad Company 290 F. 2d 296 (Third Circuit 1961). The Court in Seaboldt held that defendant railroad was entitled to a new trial of plaintiff's personal injury action because of the failure of the plaintiff's counsel to supply defendant with information concerning back treatment given plaintiff by chiropractor prior to the accident, in violation of the pretrial order of the court directing lawyers to exchange all medical information and photographs. The Court stated:

> "It is true that we cannot say for a certainty that previous knowledge of this chiropractor's identity and what he was

> going to say would have changed the case from a verdict for the plaintiff to one for the defendant or have changed the amount of the verdict. But, it would have made a difference in Railroad counsel's approach to the testimony of several witnesses...As said before, it cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin, 1931, 283 U.S. 520, 521-522; 51 S.Ct. 501, 502; 75 L.Ed. 1243.

Petitioner asserts that the opinion of the court in Seaboldt, supra, and further, the right, generally, to a new trial on the grounds of surprise and misconduct of counsel must apply a fortiori to the case at bar; while it is the well settled rule that the grant or denial of a motion for new trial rests with the sound discretion of the trial judge, this Court has consistently held that in a Title VII action the plaintiff "must...be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext."

(McDonnell Douglas Corporation v Green (1973) 411 U.S. 792, 804, Furnco Construction Corp. v Waters (1978) 438 U.S. 567, 578, Board of Trustees v Sweeny (1978) 439 U.S. 24.)

In the case at bar, had Respondent's counsel not engaged in misconduct which resulted in Agent Stewart's surprise testimony, or, alternatively, had Petitioner been granted a new trial on the grounds of such surprise and misconduct, then Petitioner would have had a fair opportunity to demonstrate that Mr. Stewart's testimony concerning the heroin flushing allegation was fabricated.

In so doing, the Petitioner would then have also had a fair opportunity to demonstrate that Respondent's stated reasons for his discharge were in fact pretext because:

1.) It would of course demonstrate that the heroin flushing allegation was false and, therefore, not a legitimate basis for Petitioner's termination;

2.) It would tend to show that Mr. Stewart and/or the BNDD did in fact engage in

discriminatory treatment of Petitioner in that Mr. Stewart would testify to such falsehood against Petitioner;

3.) It would discredit Mr. Stewart's other testimony regarding the allegedly legitimate reasons for Petitioner's termination; and

4.) The fact that Mr. Stewart would fabricate an incident of misconduct on the part of Petitoner clearly raises the inference that he knew that, absent such fabrication, there was no legitimate nondiscriminatory basis for Petitioner's termination.

The denial of Petitioner's motion for a new trial was therefore tantamount to a denial of his right to a fair opportunity to demonstrate that Respondent's stated reasons for Petitioner's discharge were in fact pretext.

C. The Court of Appeals For The Ninth Circuit, In Affirming The District Court's Denial of Petitioner's Motion For New Trial On The Grounds Of Newly Discovered Evidence Relative To The Testimony Of Dunagan, Denied Petitioner A Fair Opportunity To

Show That The Respondent's Stated Reasons For Termination Of Petitioner's Employment Were In Fact Pretext.

In attempting to establish that Petitioner was terminated for legitimate nondiscriminatory reasons, Respondent called as a witness Mr. Dunagan.

Mr. Dunagan testified to three alleged incidents of misconduct involving Petitioner:

1.) That Petitioner had told him that he, Petitioner, had obtained a "beer connection" (privilege of obtaining beer at a discount) for falsifying a police report;

2. That Petitioner was drinking at the Oasis Bar in San Franicsco when on sick leave; and

3.) That Petitioner had misused a government vehicle and credit card, and specifically that he, Dunagan, had interviewed Mr. Dan Tuttle, the manager of the service station in Ignacio, California where Petitioner allegedly used a government credit card to purchase one dollar worth of gas for

personal use. (Dunagan's testimony is set out at length, supra, pp 15-17.)

Petitioner, in his motion for a new trial attached as Exhibit "E" (RAP 211) an affidavit of Dan Tuttle (supra, at 17) to the effect that Mr. Tuttle never spoke with Dunagan or anyone else concerning the alleged incident.

> "Where a review of material evidence newly discovered after a trial clearly indicates that substantial justice was not done, and where the non-prevailing party was not dilatory in failing to discover such evidence before trial, a proper motion for a new trial should be granted." (Edgar v Finley, 312 F. 2d 533 (8th Circuit 1963)

Petitioner maintains, as he did in his motion for new trial that the affidavit of Dan Tuttle, which demonstrates that Respondent's witness Dunagan perjured himself in testifying against Petitioner, is such newly discovered material evidence as to warrant a new trial under the general standard for determination of the right to a new trial.

However, Petitioner respectfully asserts further, as discussed at length in Part B,

supra, that in reviewing the denial of a motion for a new trial in a Title VII action, this court must determine whether the plaintiff-employee was denied a fair opportunity to demonstrate that the employer-defendant's stated reasons for the employee's discharge were in fact pretext.

In the instant case, had Petitioner been granted a new trial he would have had a fair opportunity to demonstrate Dunagan's testimony concerning the Ignacio service station incident was fabricated, and in so doing, the Petitioner would then have also had a fair opportunity to demonstrate that Respondent's stated reasons for his discharge were in fact pretext because:

1.) It would tend to demonstrate that Petitioner had not in fact engaged in the misconduct concerning the use of the government vehicle, which was one of the allegedly legitimate reasons for Petitioner's discharge;

2.) It would discredit Dunagan's other testimony concerning alleged legitimate

reasons for Petitioner's termination as discussed at length, supra, pp 15-17);

3.) It would tend to show that Dunagan and/or the BNDD did in fact engage in discriminatory treatment of Petitioner in that Dunagan would testify to such falsehood against Petitioner; and

4.) The fact that Dunagan would fabricate an incident of misconduct on the part of Petitioner clearly raises the inference that he knew that, absent such fabrication, there was no legitimate basis for Petitioner's termination.

Petitioner having been denied a new trial was thereby denied the fair opportunity, guaranteed him by the decisions of this Court, to demonstrate that Respondent's stated reasons for Petitioner's termination of employment were in fact pretext.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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HOWARD R. WEBER
RICHARDS & WEBER

Attorneys for Petitioner
Charles Dennis Thompson

EXHIBIT A
Page 1

FILED

JUL 22 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES DENNIS THOMPSON,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF NARCOTICS AND DANGEROUS DRUGS,

Appellee.

No. 78-1427

O R D E R

Before: SNEED, KENNEDY, and HUG, Circuit Judges.

Upon due consideration, the petition for rehearing is DENIED.

EXHIBIT A
Page 2

EXHIBIT B
Page 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

CHARLES DENNIS THOMPSON,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION,

Appellee.

No. 78-1427

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Before: SNEED, KENNEDY, and HUG, Circuit Judges.

Even if we entertain the dubious premise that appellant made out a prima facie case, the evidence is more than sufficient to support the trial court's conclusion that the discharge was for legitimate reasons, not pretexts. The appellant's own statements were properly considered, and were not inadmissible hearsay. Fed. R. Evid. 801(d)(2).

The showing in support of the motion for new trial was quite insubstantial, and the trial court acted well within its discretion to deny it.

AFFIRMED.

EXHIBIT B
Page 2

Supreme Court of the United States

No. A-313

EXHIBIT C
Page 1

CHARLES DENNIS THOMPSON,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(x),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 30, 1980.

EXHIBIT C
Page 2

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 14
day of October, 1980.